



EMPLOYMENT TRIBUNALS

Claimant: Mr D Hughes

First Respondent: East of England Ambulance Service NHS Trust

Heard at: Watford (by CVP) **On:** 12 December 2023

Before: Employment Judge Daniels (sitting alone)

Appearances:

For the claimant: In person

For the Respondent: Mr P Keith (Counsel)

REASONS FOR JUDGMENT DATED 23 JANUARY 2024

1 Facts

2 The request for reasons by the claimant relates to a judgment signed on 12 December 2023 and sent to the parties by the Tribunal on 23 January 2024.

3 The Claimant is employed by the Respondent as a Make Ready Operative and has been employed since 6 January 2020. The Respondent is an NHS Trust responsible for providing 24-hour access to accident and emergency services to those in need of emergency treatment and transport in Bedfordshire, Hertfordshire, Essex, Norfolk, Suffolk and Cambridgeshire.

4 On or around 30 June 2021, as a result of the commencement of a disciplinary investigation into the Claimant's conduct, the Claimant was notified by Paul Henry, Deputy Director of Operations Support, that he would be temporarily redeployed from his usual place of work, Luton Ambulance Station "Luton" to Kempston Ambulance Station "Kempston". This was to enable the Respondent to carry out an investigation into the disciplinary allegations against him.

5 The claimant says it was intended that the claimant's hours of work/rota would remain unchanged, and the Claimant would be able to claim for mileage or use Trust transport between Luton and Kempston. This is disputed.

6 On 20 November 2021, the Claimant raised a grievance in respect of Matthew Wade, Make Ready Group Lead ("November Grievance"). This included allegations that Mr Wade had, from 30 August 2021, made changes to the Claimant's working hours and issues regarding the Claimant's ability to work overtime hours.

7 It was agreed that the November Grievance would be dealt with informally and David John Williams, Head of Make Ready Services, conducted an informal investigation into the issues raised.

8 On 4 March 2022, the Claimant raised a further grievance to Mr Henry ("March Grievance"). This grievance related to numerous issues including:

- (a) The Claimant's working hours being changed from September 2021;
- (b) Reallocation of shifts in November 2021 that the Claimant had volunteered to cover;
- (c) The Claimant being prevented from covering available shifts in February 2022; and that these changes resulted in a change of pay, relating to unsociable hours enhancements, overtime, incentive payments and AfC ('Flowers') payments.

9 On 8 March 2022, Mr Williams wrote to the Claimant to confirm the informal outcome of his November Grievance, being that mediation had taken place with Mr Wade.

10 Mr Williams further confirmed that a HR2 (the Respondent's internal HR form) was being raised to address a shortfall in the Claimant's August pay and the Respondent's records would be updated to reflect this.

11 On 6 April 2022, the Claimant met with Mr Henry for a grievance hearing in respect of the March Grievance. The Claimant was accompanied by his trade union representative.

12 On 6 June 2022, Mr Henry wrote to the Claimant to confirm the outcome of his March Grievance. The outcome letter confirmed that the Claimant's March Grievance was partially upheld. The Claimant's hours of work did change due to a difference in operating hours between Kempston and Luton. Mr Henry made no findings in respect of overtime, other than to find that the Claimant had no contractual entitlement to work overtime and this issue had been deferred to Jackie Nugent, Head of Estates, Infrastructure and Transformation. Mr Henry directed that the Claimant be reimbursed in respect of unsociable hours enhancements and directed the Claimant's manager to liaise with finance to arrange a reconciliation regarding any 'Flowers' payments. The Claimant was informed of his ability to appeal the outcome.

13 On 22 June 2022, Ms Nugent wrote to the Claimant to confirm the outcome in respect of the overtime element of his March grievance. The outcome was that the Claimant's grievance relating to overtime was not upheld. The Claimant appealed the outcomes of his March Grievance on 8 July 2022, disputing the calculation of the

unsociable enhancement reimbursement, and appealing the outcome relating to overtime.

14 On 3 August 2022, the disciplinary investigation into the Claimant concluded. The Claimant was informed that this would proceed to a formal disciplinary hearing. The Claimant was suspended from the same date, pending a disciplinary hearing on 23 August 2022.

15 The Claimant's disciplinary hearing took place on 30 August 2022. The outcome was that three allegations were upheld and one partially upheld. The sanction was a 12- month final written warning, this was confirmed in an outcome letter to the Claimant. The Claimant's suspension ended on the same date, and he returned to Luton following a period of sickness absence.

16 On 14 and 31 October 2022, the Claimant attended the grievance appeal hearing, accompanied by his trade union representative. Emma de Carteret, Director of Corporate Affairs and Performance was appointed to chair the appeal panel. The initial appeal hearing was reconvened to allow for additional information to be gathered.

17 On 6 March 2023, the Claimant's appeal outcome was provided. The appeal was not upheld, save for an amendment to the calculation used to determine the reimbursement of unsociable enhancements.

18 ET claims brought

19 The first claim was lodged under case number 3305983/23 on 2 June 2023. The claim included therein was as follows: compensation for under payment of holiday pay of £247.46 from November 2022 to January 2023.

20 The second claim under case number 3306032/23 was lodged on 6 June 2023. The claimant claimed unlawful deductions for September 2021 to October 2022 in the sum of £14,633.78.

21 Having considered the claim form and response, Employment Judge French ordered that on or before 13th November 2023, the claimant provide the respondent and the Tribunal with the following further information regarding Case Number: 3306032/2023

- 1. The dates during which he says there was an underpayment of wages;*
- 2. The date that payment of the about sums should have been paid;*
- 3. Identify the specific underpayment made; and*
- 4. Identify why he says that those sums are owed to him*

22 The claimant provided further particulars under his claims for (1) alleged unlawful deductions for the period from 4 September 2021 to 26 October 2022 (based on the amount he would have earned had he not been transferred); claiming £14,633.78; (2) payments of £1697.96 for pay between August and October 2022 and (3) holiday pay for 2 November 2022 to 5 January 2023.

23 Relevant law

24 Section 13(1) of the Employment Rights Act 1996 provides that an employer cannot lawfully make deductions from wages unless entitled to by the contract of employment, statute or because the worker has previously consented in writing to the deduction.

25 Case law has established that where an employee has a claim for failure to provide work (and thus wages) the appropriate claim is for breach of contract rather than unlawful deductions from wages. In [Besong v Connex Bus \(UK\) Ltd UKEAT/0436/04](#), Mr Besong was paid hourly and was only entitled to wages for the days on which he worked. His claim was not that he had not been paid for work that he had done, but that Connex had failed to make work available for him and that this amounted to a breach of his contract (under which he claimed he was entitled to at least three days' work per week). The EAT held that he did not have a claim for unlawful deductions from wages.

26 In [Serco Ltd T/A Education Bradford and others v Quarshie UKEAT/0466/05](#), the employer had a contractual right to end an employee's temporary appointment at a higher grade and return the employee to their original post (which was at a lower grade). The EAT held that a reduction in the employee's pay to the lower rate of pay during a period of suspension "on full pay" was not an unlawful deduction from wages.

27 Conclusions in this case

28 Claim 1: Pay between September 2021 and February 2022

29 The claimant claimed unlawful deductions for September 2021 to October 2022 in the sum of £14,633.78.

30 The Employment Tribunal has no jurisdiction to hear the claim with regard to the claimant's pay between September 2021 and February 2022 as the claim relates to an alleged breach of contract (relating to his transfer from Luton to Luton Kempston base and the effects of that) and not an unlawful deduction from wages in the above period regarding the work actually performed.

31 In essence, the claimant was paid the correct amount of wages for the hours and days he worked at Kempston and he accepted this at the hearing. His case is that, when transferred, he should have been paid at the rate as if he had stayed working at Luton (which would have involved more unsocial hours etc) and he should be compensated for the difference, even though he did not work at Luton or perform such unsocial hours at Kempston.

32 This is a breach of contract claim not an unlawful deductions claim for work done. Breach of contract claims can only be brought when arising or outstanding on termination of employment. There has been no termination here and so the Tribunal has no jurisdiction to hear that claim.

33 Time limits

34 The claim for unlawful deductions is also time-barred because as set out by the Claimant in his particulars of claim, the claim relates to an alleged underpayment of wages for the period September 2021 to February 2022. Therefore, the last possible

date of any alleged underpayment would have been February 2022. In this case, I found that there was no unlawful deduction from wages for the work performed anyway.

35 In any event, however, any claim for unlawful deduction of wages must be brought within the three months beginning with the date of payment of the wages from which the deduction was made (Section 23(2), Employment Rights Act (“ERA”) 1996) or respect of a series of deductions or payments, the time limits begin to run with the last deduction or payment in the series, or the last of the payments so received (section 23(3), ERA 1996). Therefore, the last date to contact ACAS for Early Conciliation (“EC”) would have been in May 2022. The Claimant did not contact ACAS for EC until 16 May 2023, nearly 12 months following the last possible alleged deduction. The tribunal does not therefore have the jurisdiction to consider the claim. Further, and while the Tribunal sympathises with some of the difficulties the claimant experienced, the hurdle on showing it was not reasonably practicable to file in time is quite high (by long established case law) and the Claimant has not set out a cogent basis as to why it would not have been reasonably practicable to present his claim within the ordinary limitation period and why it was so significantly late

36 Accordingly, the claim also falls to be dismissed on the basis that the Tribunal has no jurisdiction to consider the claim in accordance with rule 27 of The Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013

37 Claim 2 Pay for August to October 2022 during periods of absence

38 The Employment Tribunal has no jurisdiction to hear an unlawful deductions claim with regard to the claimant’s pay between 3 August 2022 and 26 October 2022 (when the claimant was allegedly suspended from duties, absent sick and/or stood down from service) as such claim relates to an alleged breach of contract and not an unlawful deduction from wages, for work actually performed.

39 In essence, the claimant was paid the correct amount of wages for the actual hours and days he worked in this period and he again accepted this at the hearing. His case is that he should not have been stood down from duties etc and he should be compensated for the difference in pay, even though he did not perform such duties.

40 Breach of contract claims can only be brought when arising or outstanding on termination of employment. There had been no termination here and so the Tribunal has no jurisdiction to hear that claim.

41 Time limits

42 The claim is time-barred because as set out by the Claimant in his particulars of claim, the claim relates to an alleged underpayment of wages for the period 3 August 2022 and 26 October 2022. Therefore, the last possible date of any alleged underpayment would have been October 2022. In this case, I found that there was no unlawful deduction from the wages properly payable for the work done and the claimant agreed at the hearing.

43 In any event, however, any claim for unlawful deduction of wages must be brought within the three months beginning with the date of payment of the wages from which the deduction was made (Section 23(2), Employment Rights Act (“ERA”) 1996) or respect of a series of deductions or payments, the time limits begin to run with the last deduction or payment in the series, or the last of the payments so received (section 23(3), ERA 1996), Therefore, the last date to contact ACAS for Early Conciliation (“EC”) would have been in February 2023. The Claimant did not contact ACAS for EC until 16 May 2023, nearly 3 months following the last possible alleged deduction. The tribunal does not therefore have the jurisdiction to consider the claim. Further, and while the Tribunal sympathises with some of the difficulties the claimant experienced, the hurdle on showing it was not reasonably practicable to file in time is quite high (by long established case law) and the Claimant has not set out a cogent basis as to why it would not have been reasonably practicable to present his claim within the ordinary limitation period and why it was so significantly late.

44 Accordingly, this claim also falls to be dismissed on the basis that the Tribunal has no jurisdiction to consider the claim in accordance with rule 27 of The Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013

45 Claim 3; Holiday pay claim November 2022 to February 2023

46 The Employment Tribunal has no jurisdiction to hear the claim with regard to the claimant’s holiday pay between November 2022 and February 2023 for £1697.96 (including by reference to a period when the claimant was absent as he was allegedly suspended, absent sick and/or stood down from service) or a further or related claim for £247.40 as such claims relate to an alleged breach of contract (prior to such dates) and not an unlawful deduction from wages.

47 In essence, the claimant was paid the correct amount of wages for the actual hours and days he worked in this period and he accepted this at the hearing. His case is different: that he should not have been stood down from duties etc and he should be compensated for the difference in holiday pay, under his contract, even though he did not perform such duties.

48 Breach of contract claims can only be brought when arising or outstanding on termination of employment. There has been no termination here and so the Tribunal has no jurisdiction to hear that claim.

Employment Judge Daniels

12 March 2024

Sent to the parties on:

21 March 2024.....

For the Tribunal:

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